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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 1037

In the Matter of
HERBERT LEE TIMMERMAN, JR.,
Bankrupt.

JAMES J. DONOHUE,
Defendant-Petitioner,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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No.

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vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

James J. Donohue, Petitioner herein, prays that a Writ of Certiorari be issued to review the order of the Circuit Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Eastern District of Wisconsin adjudging him guilty of criminal contempt of Court for violation of Section 41 of the Bankruptcy Act, 11 U. S. C. A. Section 69, in proceedings held pursuant to Section 21(a) of the Bankruptcy Act, 11 U. S. C. A. Section 44(a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case has not yet been published, but it is copied in Appendix A (post p. 10).

The Order made and filed on December 22, 1961, in the United States District Court for the Eastern District of Wisconsin, the Honorable KENNETH P. GRUBB, District Judge presiding, appears in Appendix B (post p. 16).

JURISDICTION

The Order of the Honorable Judge GRUBB of the District Court for the Eastern District of Wisconsin was made and entered on December 22, 1961, and the Order of the Circuit Court of Appeals for the Seventh Circuit was made and entered on May 11, 1962.

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does Section 41(a) of the Bankruptcy Act (11 U. S. C. 69) make it mandatory that a creditor of a bankrupt appearing as a witness under a 21-a examination be paid or tendered his lawful mileage and fee for one day's attendance before he can be compelled to answer any questions put to him at said examination?

2. Is a creditor of a bankrupt who appears as a witness at a 21-a examination entitled to have his counsel, who appears with him at said examination, participate in his behalf?

3. In a prosecution for criminal contempt, when the creditor-witness being charged appears at the trial with

his counsel ready to defend against the charges, is it proper for the Court to make a finding of guilty when the defendant has not been allowed to make a formal plea of not guilty and when the prosecution offers absolutely no oral testimony and introduces no exhibits or no evidence whatsoever and thereby fails to carry the burden of proof required to establish guilt beyond a reasonable doubt?

4. When a creditor of a bankrupt is called to testify as a witness at a 21-a examination and the following circumstances occur:

a. Said witness is not first paid or tendered his lawful mileage and fee for one day's attendance at said examination.

b. Said witness is denied the right to have his counsel who is present with him take part in the examination or participate in the examination in any manner.

c. The interrogator inquires into the merits of the witnesses' claims against the bankrupt.

and, having been cited for contempt by the referee in bankruptcy, such creditor-witness appears before the District Court as a defendant to answer such charges with his counsel and the following circumstances then occur:

a. The defendant is not asked to enter a formal plea but is prepared to defend against the charges.

b. The prosecution offers no testimony or exhibits and introduces no evidence whatsoever but rests on the certificate of the referee.

c. The "hearing" consists only of brief opening statements by counsel on both sides wherein defendant's counsel does not admit to the charges made.

then, under such circumstances, when the Trial Court makes a finding of guilty and imposes a One Hundred Dollar fine in punishment against the defendant, is there a violation of the defendant's rights to due process of law as guaranteed by Articles V and XIV of the Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES OR REGULATIONS INVOLVED

ARTICLES V and XIV—Amendments to the United States Constitution: and Article I, Section 8 of the Wisconsin Constitution provides:

> *"No person shall be deprived of life, liberty, or property without due process of law."* (The defendant was found guilty and fined without due process of law.)

Section 41(a) of the Bankruptcy Act (11 U.S.C. 69) provides that a witness at a 21-A examination must be "first paid or tendered his lawful mileage and fee for one day's attendance" before he be required to *"attend as a witness before a referee"*. (There is no showing of such payment or tender.)

Section 41(b) of the Bankruptcy Act (11 U.S.C. 69) provides that in a trial for criminal contempt the Judge must *"hear the evidence as to the acts complained of"* and only if the evidence is *"such as to warrant him to do so"* shall the defendant be punished for contempt. (The Trial Court did not "hear any evidence as to the acts complained of".)

Section 21(a) of the Bankruptcy Act (11 U.S.C. 444) authorizes examination of the witness, but *"only concern-*

ing the acts, conduct, or property of a Bankrupt". (Inquiry was made into the merits of the creditors' claim.)

Section 955.08 of the Wisconsin Statutes provides:

> *"If on the arraignment the defendant fails or refuses to plead, a plea of not guilty shall be entered".* (No plea having been requested or made it should be deemed that this defendant who stated, "I'm going to fight for my rights," has entered a plea of not guilty.)

STATEMENT OF THE CASE

The petitioner, James J. Donohue, appeared before Honorable HOWARD W. HILGENDORF, Referee in Bankruptcy, on November 16, 1961, pursuant to an Order for 21-A Examination. On said date at 2:30 P.M. Martin Gedlen, the duly appointed attorney for the trustee herein, proceeded to conduct said 21-A Examination.

After a short period of questioning, the Referee, Howard W. Hilgendorf, adjourned the proceedings and notified the petitioner that he would cite him for contempt. This proceeding commenced on December 12, 1961, when the said Referee filed with the Court a Certificate of Contempt as to James J. Donohue, the petitioner herein. On said day, Honorable Kenneth P. Grubb, ordered the said James J. Donohue to show cause why he should not be punished for contempt of Court by reason of the facts certified, returnable on December 21, 1961. The hearing was called on that date before Judge Kenneth P. Grubb. No testimony was taken and no evidence was offered. James J. Donohue appeared personally and represented by his attorney, Sydney M. Eisenberg, and appearing for the United States was Assistant United States Attorney Philip L. Padden. The Court issued an Order

dated December 22, 1961, wherein the Court stated in part as follows:

> ". . . having the benefit of oral argument by the respective attorneys, and having examined the records and official transcript of testimony taken of James J. Donohue by Valerie J. Radtke, Court Reporter, on November 16, 1961, and otherwise being fully advised in the premises,
>
> IT IS HEREBY ADJUDGED, that James J. Donohue was, by his conduct, guilty of criminal contempt of Court and
>
> It is the Judgment and sentence of this Court, that James J. Donohue be fined the sum of $100.00 and James J. Donohue is hereby further ordered and directed to appear at the Bankruptcy Court for a continuation of the 21-A Examination previously held on November 16, 1961, at such time as the Referee in Bankruptcy may designate."

The petitioner appeals from this Order.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Federal Jurisdiction in the Court of First Instance is not disputed and was invoked by Section 2 of the Bankruptcy Act (11 U. S. C. 11).

ARGUMENT TO SUPPORT ALLOWANCE OF THE WRIT

It is respectfully submitted that in furtherance of an orderly and uniform system to conform with our established concept of jurisprudence this Honorable Court should answer the questions herein raised and thereby provide precedence which will tend to promote the rights

of our citizenry to equal protection under the laws of this country.

Even slight deviation from legal modes of procedure may eventually result in illegitimate and unconstitutional practices. See dissenting opinion Mr. Justice Frankfurter in *Shapiro vs. U. S.*, 335 U. S. 1, at p. 69, 68 S. Ct. 1375, at p. 1410.

This Court has held that the requirements of the due process clause of the Fifth and of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty and accused may ultimately be found to be after guilt has been *established in accordance with the procedure demanded by the Federal Constitution. Chessman vs. Teets,* 354 U.S. 156, 1 L. ed. 1253, 77 S. Ct. 1127.

The defendant seeks this Writ in good faith and sincerely believes that in the proceedings which gave rise to the charge against him and the manner whereby he was found guilty and punished by fine contained a manifest failure to observe that fundamental fairness essential to the very concept of justice. This constitutes denial of due process. *Lisenba vs. California*, 314 U. S. 219, 86 L. ed. 166, 62 S. Ct. 280.

This Court has held that due process of law precludes defining, and thereby confining, the standards required more precisely than to say that prosecutions can not be brought about by methods that offend "a sense of justice." *Rochin vs. California,* 342 U. S. 165, 72 S. Ct. 205.

It is respectfully submitted that the examination of the defendant although held under the authorization of Section 21(a) of the Bankruptcy Act, 11 U. S. C. A. 444, in view of the fact that the witness was a creditor with a

claim against the bankrupt and because of the precise questions which were put to the defendant, was, in substance and effect, an adverse proceedings against the defendant and constituted an improper inquiry into the merits of the creditors' claim. Refusal to let the witnesse's attorney participate and raise seasonable objection to errors and irregularities as required by Rule 32(c)(2) resulted in a clear violation of the defendant's rights. See *In re Emigh,* 243 F. 988.

It is further submitted that the authority recited in *In re Haring (in re Holden),* 203 Fed. 229, cert. den. 229 U. S. 621, provides that the certificate of the referee is only the means whereby the Judge is informed of the alleged contempt. This certificate is not binding upon the Judge nor does it conclude his action in any way. Further, in *Matter of McIntosh,* 73 F. (2d) 908, it was held that in a prosecution for criminal contempt, the certificate of the Referee is nothing more than a pleading which the bankrupt is called upon to answer, and if he does so by a plea of not guilty, *the burden of establishing his guilt beyond a reasonable doubt lies with the prosecution, which must thereupon introduce evidence.*

CONCLUSION

In conclusion, thePetitioner respectfully requests that this Honorable Court grant the Writ of Certiorari to the end that all the questions raised on this appeal be fully answered and to the further end that the best interests of justice be served. In addition, there exists a conflict of laws relating to the questions involved and this Court should resolve such conflict.

It is important to our country that it not be permitted for convictions to become more important than the preser-

vation of the guarantees of Articles V and XIV of the amendments to the United States Constitution—whose counterparts are found in the Bill of Rights, United States Constitution. Our laws and our Courts were created and instituted primarily to protect and enforce the private rights of individuals.

It is respectfully submitted that a Writ of Certiorari should be directed herein to the United States Court of Appeals for the Seventh Circuit and that in due course the issues be passed upon by this Honorable Court.

Respectfully submitted,

SYDNEY M. EISENBERG
EDWIN A. STAR
1131 W. State St.
Milwaukee, Wisconsin
Attorneys for Petitioner

CERTIFICATE

I hereby certify that a printed copy of the foregoing, together with the Appendix, have been served on the United States Attorney for the Eastern District of Wisconsin, the Attorney General of the United States, and the Solicitor General of the United States, by placing copies of same in the United States Mail, directed to them at their respective offices, postage prepaid.

Dated at Milwaukee, Wisconsin, this 7th day of June, 1962.

Edwin A. Star

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 13609 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

In the Matter of
HERBERT LEE TIMMERMAN, JR.,
Bankrupt.

JAMES J. DONOHUE,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

May 11, 1962

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendant, James J. Donohue, has appealed from an order of the district court adjudging him guilty of criminal contempt of court for a violation of § 41 of the Bankruptcy Act, 11 U.S.C.A. § 69, in proceedings before Howard W. Hilgendorf, a referee in bankruptcy, held pursuant to § 21 (a) of the Bankruptcy Act, 11 U.S.C.A. § 44 (a).

It appears from the record that defendant appeared as a witness before said referee in bankruptcy, in the matter of Herbert Lee Timmerman, Jr., bankrupt, on November 16, 1961. Defendant was interrogated by attorney Martin Gedlen representing the trustee in bankruptcy. Defendant was represented by attorney Paul Runkel.

The questions put to defendant pertained to certain alleged assets of the bankrupt who operated a tavern in premises owned by defendant. Much of the examination dealt with what the trustee's attorney referred to as an inventory made by the bankrupt. Numerous answers of defendant were, according to the referee, not responsive to the questions and resulted in the referee stating that, if defendant did not answer the questions, he would be cited for contempt. The record, as filed in the district court, and the referee's certificate, both show that defendant stood up and faced the referee, pounded his fist on the bench, and answered in a loud voice: "Then cite me for contempt! This is still America and I won't be pushed around by anybody." Thereupon the hearing was adjourned and defendant was cited for contempt.

In his certificate the referee certified that on five separate occasions during the course of such examination he "found it necessary to admonish said James J. Donohue and to direct him to answer certain questions put to him by the examiner, all of which appear in the official transcript hereto attached; * * * [defendant] did at and during the course of such proceeding act and conduct himself in a manner disrespectful to the Court as heretofore related and did wilfully fail to answer proper questions put to him by an authorized examiner after I had directed him to do so, all of which conduct I deem to be in contempt of Court, and I therefore respectfully request that

this certificate be considered for further proceedings herewith."

Upon this certificate of contempt, the district court ordered defendant to show cause why he should not be punished for contempt of court by reason of the facts so certified.

The order to show cause having been duly served on defendant, it appears from the record that he appeared before the district court and, upon the certificate and rule to show cause, defendant being represented by counsel, the court heard the arguments of the respective attorneys, examined the record and official transcript of testimony, entered an order which adjudged defendant guilty of criminal contempt of court, and sentenced him to pay a fine of $100. This appeal followed.

1. It is defendant's contention that the evidence, as shown by the record, of the acts complained of is not adequate and such as to warrant the judge to make a finding of guilty of criminal contempt against him.

It is unnecessary to repeat the recital of defendant's conduct as shown by the referee's certificate and the record of proceedings. There is present in the record substantial evidence to support the court's finding of contempt. That is sufficient. *Haimsohn v. U.S.*, 6 Cir., 2 F. 2d 441; *Davidson v. Wilson*, 3 Cir., 286 F. 108, 111.

Among the cases cited by plaintiff is *In re Eskay*, 3 Cir., 122 F. 2d 819, which quotes from *In re Schulman*, 2 Cir., 177 F. 191, which we have found helpful. Schulman, a bankrupt, was adjudged guilty of contempt of court for refusing to answer questions before a referee, who certified the matter to the district court. The court of appeals said, at 192:

"The questions of fact presented by this appeal are peculiarly within the province of the referee and District Judge. * * *"

The court then pointed out:

"* * * The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. * * *"

The court then pointed out, at 193:

"Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answer 'I don't remember,' and 'What do you mean?' so often given might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand could not be deceived as to his purpose.

"The testimony as it appears in the record evinces a deliberate purpose to conceal the truth and prevent the trustee from becoming possessed of facts which would lead to a recovery of the missing property. The witness was being asked regarding transactions directly within his knowledge and facts which he must have known. When, therefore, he answered repeatedly 'I don't remember,' it is obvious that he was deliberately withholding information to which the trustee was entitled. In effect his attitude was one of defiance. He did not affirmatively tell the referee

that he refused to disclose the facts which would enable the trustee to follow the property, although these facts were well known to him, but his conduct produced the same result as if he had stated his purpose openly."

The court affirmed the contempt order in that case.

What was said by the court in *Schulman* indicates that it is the law that the district court in adjudicating upon a charge of criminal contempt has a right to take into consideration the effect which the witness's conduct had upon the referee before whom the testimony was received.

2. Contending that there was a refusal to permit defendant to be represented by counsel at the hearing before the referee, defendant now contends that he was deprived of due process of law under the fifth amendment to the United States constitution.

The record shows that the referee advised defendant's attorney that during the pending § 21 (a) proceeding he could confer and assist his client to protect his interest, but not to hinder the proper objectives of the examination. The object of such a proceeding is to enable the trustee or any creditor to discover assets of the estate.

The examination of defendant as a witness was for the purpose of eliciting information relevant in the administration of the bankruptcy estate. No adverse proceeding against defendant was pending or apparently even contemplated.

There is a convenient collection of authorities in *In re Emigh*, 243 F. 988, in which the court held, at 991, that, as to matters not involving the merits of the claims of a witness against a bankrupt estate, there was no objection to a full and complete examination of the witness under § 21 (a), in the absence of counsel for such witness. To

the same effect is *In re Bogen*, 19 F. 2d 935. In the case at bar, if the examination of defendant had been conducted as an incident of an adverse proceeding against defendant, a different situation might have been presented.

We have considered all of the errors assigned by defendant and we find no error in this record. Therefore, the order from which this appeal has been taken is affirmed.

ORDER AFFIRMED.

No. 13609

KILEY, *Circuit Judge*, concurring. The court's opinion does not answer defendant's argument that the District Court did not "hear the evidence as to the acts complained of" as required by § 41 (b) of the Bankruptcy Act.[1] The answer is that the Government rested its case upon the referee's certificate and the transcript of proceedings, before the referee, filed with the court; the record does not show a "plea of not guilty" as there was in *In re McIntosh*, 9 Cir., 73 F. 2d 908, cited by defendant, and defendant made no offer of evidence at the hearing; and on what was before the District Court as recited in its order there was sufficient evidence to sustain the finding of guilt.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[1] 11 U.S.C. § 69.

APPENDIX B

ORDER OF U. S. DISTRICT COURT

(Filed December 22, 1691)

Upon the certificate of contempt by the Honorable Howard W. Hilgendorf, Referee in Bankruptcy, and pursuant to the provisions of Section 41(b) of the Bankruptcy Act, James J. Donohue was ordered and directed to appear before the undersigned United States District Judge in his Court Room, Room 376, Federal Building, Milwaukee, Wisconsin, on the 21st day of December, 1961, at 9:30 a.m. to show cause, if any, he had, why he, the said James J. Donohue should not be punished for contempt of court by reason of his conduct before the Honorable Howard W. Hilgendorf, Referee in Bankruptcy on November 16, 1961, and that on said 21st day of December, 1961, James J. Donohue did appear before this court personally and represented by his attorney, Sidney M. Eisenberg and appearing for the United States was Assistant United States Attorney Philip L. Padden, and the court having the benefit of oral argument by the respective attorneys and having examined the records and official transcript of testimony taken of James J. Donohue by Valerie J. Radtke, Court Reporter, on November 16, 1961, and otherwise being fully advised in the premises,

It is hereby adjudged that James J. Donohue was, by his conduct, guilty of criminal contempt of court and,

It is the judgment and sentence of this court that James J. Donohue be fined the sum of $100.00 and James J. Donohue is hereby further ordered and directed to appear at the Bankruptcy Court for a continuation of the 21A examination previously held on November 16, 1961, at such time as the Referee in Bankruptcy may designate.

/s/ Kenneth P. Grubb

December 22, 1961. United States District Judge

APPENDIX C

WISCONSIN STATUTE INVOLVED

Sec. 955.08

Plea if accused stands mute. If on the arraignment the defendant fails or refuses to plead, a plea of not guilty shall be entered.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 171

JAMES J. DONOHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10–15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1962. The petition for a writ of certiorari was filed on June 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district judge could properly make a finding of contempt upon the certified copy of the transcript of proceedings before a referee in

bankruptcy, where the contemnor did not present evidence although afforded an opportunity to do so.

2. Whether the action of petitioner in pounding his fist upon the bench after having been admonished that his evasiveness in answering questions was contemptuous was excused by alleged errors in the procedure followed by the referee in conducting his examination under Section 21(a) of the Bankruptcy Act.

STATUTES INVOLVED

Section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), provides:

> (a) The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt.
>
> * * * * * *

Section 41 of the Bankruptcy Act, 11 U.S.C. 69, provides:

> (a) A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpenaed, or, upon appearing, refuse to take the oath as a witness, or having taken the oath, refuse to be examined according to law: *Provided,* That a person other than a bankrupt or, where the bankrupt is a corpora-

tion, its officers, or the members of its board of directors or trustees or of other similar controlling bodies, shall not be required to attend as a witness before a referee at a place more than one hundred miles from such person's place of residence or unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

(b) The referees shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section, and he may serve or cause to be served upon such person an order requiring such person to appear before the judge upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before him, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of the court of bankruptcy or in the presence of the judge.

STATEMENT

1. On December 22, 1961, petitioner, pursuant to Section 41 of the Bankruptcy Act, 11 U.S.C. 69, was adjudicated guilty of criminal contempt by the United States District Court of the Eastern District of Wisconsin (R. 2–3). The referee in bankruptcy had certified that petitioner had engaged in contemptuous conduct on November 16, 1961, while he

was testifying in an examination under section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), as follows (R. 4–6):

> [T]hat on five separate occasions during the course of such examination I found it necessary to admonish said James J. Donohue and to direct him to answer certain questions put to him by the examiner, all of which appear in the official transcript hereto attached; that during these proceedings and after I had directed said James J. Donohue to answer the questions or be cited for contempt, said James J. Donohue got out of the witness chair, hit the Bench with his fist and shouted, "Then cite me for contempt! This is still America and I won't be pushed around by anybody!" That thereafter I adjourned said proceedings for the purpose of making his certification of contempt.

Attached to the certificate was the official transcript of the examination together with documents filed in the proceedings (R. 5–6).

On December 12, 1961, the district judge issued an order requiring petitioner to appear before the judge and show cause why he should not be adjudged in contempt by reason of the facts certified by the referee (R. 3). On December 21, 1961, petitioner appeared in court with counsel. The district judge, after hearing oral argument of counsel and after examining the official transcript and the documents, adjudged that petitioner "was, by his conduct, guilty of criminal contempt of court" and fined him the sum of $100 (R. 2).

2. On November 16, 1961, petitioner had appeared as a witness before the referee in bankruptcy with his attorney Paul Runkel (R. 7). He had been subpoenaed for examination with respect to the property of Herbert L. Timmerman, Jr., the bankrupt, and had been commanded to produce records concerning two inventories (taken on or about June 27, 1960) of the stock of merchandise located at the Town House Motel, a tavern owned by petitioner and another (R. 21–22). Examination by the attorney for the trustee in bankruptcy disclosed that petitioner and his partner had rented the tavern to Timmerman from July 1, 1959 to June, 1960 (R. 8, 11). Petitioner produced a written document showing an inventory prepared by Timmerman but denied he had any other records (R. 13, 20–22). The questions posed to petitioner centered around this inventory and a meeting at Runkel's office on June 27, 1960 attended by petitioner, his partner and Timmerman. When petitioner was asked whether Exhibit 2 was an inventory of the stock of merchandise in the motel on June 27, petitioner responded that the exhibit represented pieces of paper that Timmerman gave him containing ambiguous and absolutely worthless figures (R. 12–13). At this point the examiner requested the referee to direct petitioner to answer whether the exhibit consisted of inventory sheets. Petitioner's attorney, Paul Runkel, interrupted the examiner saying that petitioner should be allowed to answer the question.

When Runkel told the referee that he was appearing as the attorney for the witness, the referee ruled: "Well, on these 21-A examinations a witness may have an attorney present, of course, but he can't take part in the examination. I'll rule that if the witness wishes to have a recess to discuss matters with his counsel and get legal advice, he may do so, but the attorney for the witness may not participate in this examination" (R. 14). Petitioner, after being pressed for an answer, acknowledged that Timmerman had told him that Exhibit 2 was the inventory of the stock of merchandise.

With respect to the meeting in the lawyer's office, petitioner testified that there was a lot of calculating as to what was due (R. 18). He was asked whether he had not claimed a shortage of linen and the following ensued (R. 19):

> Q. * * * You also discussed the question of the shortage of linens, did you not?
>
> A. I knew that he stole the merchandise out of there, because when I passed the house he was living in, I seen the drapes and bedspreads and rugs all laying out there, airing in front of the house.
>
> Q. Did you discuss the question of linens?
>
> A. I discussed missing materials that belonged to the hotel.
>
> Q. Did you not also include a discussion of the linens?
>
> A. It included a discussion of everything.

The examiner accused petitioner of attempting to give devious answers. The referee then admonished petitioner "I'll instruct you to answer the question

as directly as you can. If you can't answer it, say so, but I think it can be answered Yes, or No. However, if you wish to make an explanation after you've answered Yes, or No, that's alright" (R. 19).

Petitioner admitted that he had calculated on a paper at Runkel's office the total amount owned by Timmerman but said he was not aware if such a paper was still in existence (R. 19–21). The only paper he found in connection with the conference was Exhibit 2. Following an interchange between the examiner and petitioner over whether he was answering the question asked, the referee told petitioner that he should just answer the question (R. 22).

Petitioner denied that he included $600 as inventory in determining the total amount that Timmerman owed, stating that $600 could not have been included because no inventory was taken. The examiner then asked if Timmerman had claimed the inventory to be $927. Petitioner responded twice that Timmerman gave him "that sheet of paper" but that when he checked at the tavern there was not even one full bottle of whiskey (R. 23). The following then occurred (R. 24):

> THE COURT [referee]. Mr. Donohue, that question is very plain. It's a simple question—whether or not Timmerman claimed that was a $927 inventory. Now, did he,—or didn't he?
>
> A. I don't know, the figures speak for themselves.
>
> THE COURT. What did Mr. Timmerman claim?
>
> A. He just gave me the figures.
>
> THE COURT. Well, go ahead.

The examiner then asked if each inventory sheet given to him by Timmerman had been totaled and petitioner replied that he had not totaled them. When asked if he knew that each had a total, petitioner responded that he did not know. The examiner then requested that petitioner answer the question. The referee told petitioner to look at the Exhibit and answer the question (R. 24–25). Petitioner then said each page had a total and that these totals had been upon the pages on June 27, 1960 and that he had possessed the Exhibit since that day (R. 25). He did not know, however, if the Exhibit totaled $927. He denied that this figure had been discussed, stating he could not give Timmerman credit for $927 because there was nothing in the tavern but a lot of empty bottles and cartons. The following then occurred (R. 26–27):

> Q. (interposing). I'm asking if you looked at those papers, at the figures on those papers that day.
>
> A. Yes, I did.
>
> Q. And didn't the papers contain an inventory of many empties?
>
> A. But they didn't belong to him.
>
> Q. But didn't that contain many empties?
>
> A. They were containers that belonged——
>
> THE COURT (interposing). Now you're intelligent enough to answer the question he's asking you. He asked a very simple question. Do those papers contain any figures relating to empties?
>
> A. I said Yes.
>
> THE COURT. No, you didn't. You've been making statements, but you don't answer the

question. We'll continue here, and if you don't answer the questions, I'll cite you for contempt.

A. (Witness stood up and faced the Referee, pounded his fist on the bench, and answered in a loud voice): Then cite me for contempt! This is still America and I won't be pushed around by anybody.

The COURT. This is adjourned, and I will cite you for contempt.

A. I'm going to fight for my rights.

ARGUMENT

Petitioner does not in this Court attack the finding that his conduct constituted contempt, and rightly so. His disorderly conduct in striking "the bench" while shouting his reply to the referee constituted misbehavior which interfered with the orderly administration of justice. As this Court said in *Cooke* v. *United States*, 267 U.S. 517, 534, "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court." See, also, *Ex parte Terry*, 128 U.S. 289, 308–309; *Fisher* v. *Pace*, 336 U.S. 155; *Offutt* v. *United States*, 348 U.S. 11. Section 41 of the Bankruptcy Act, *supra*, pp. 2–3, specifically provides for punishing misbehavior during a bankruptcy hearing as a contempt.

In re McConnell, No. 498, O.T. 1961, is not to the contrary. This Court there found that a mere statement of a lawyer, while attempting to make an offer of proof, was not sufficiently disruptive of the trial court's business to constitute contempt. The Court

recognized, however, "the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom." Here, before petitioner's outbursts, the referee had several times found it necessary to instruct the petitioner to answer the question posed (R. 19, 22, 24, 25). The referee had told petitioner that he could make any explanation he wanted following his answer to a question (R. 19), and advised petitioner he was entitled to a recess if he wished to consult his attorney who was present at the hearing. If petitioner or his counsel thought the interrogation was improper, they could have requested an adjournment. This they failed to do. Rather, petitioner persisted in his evasiveness and verbal sparring with the examiner, which led the referee to admonish him that he was courting adjudication for contempt. Perhaps petitioner's answers, taken alone, were not contemptuous. But the referee's warning that he might so treat them did not excuse petitioner's disrespectful and openly defiant conduct.

Petitioner attacks only the procedure followed in adjudicating him in contempt and the conduct of the Section 21(a) proceeding. None of his contentions have merit.

1. The procedure followed on the contempt hearing was in accord with due process. A formal charge was placed against petitioner by the certificate of contempt and the show cause order. The certificate of contempt, served upon petitioner, was accompanied by the complete transcript of the proceedings before

the referee. The show cause order gave petitioner ample time to prepare his defense. At the hearing before the district judge petitioner was represented by counsel and had the opportunity to present evidence.

Petitioner's only real complaint is that the government did not present live testimony in support of the charge, which he thinks Section 41(b) of the Bankruptcy Act requires when it speaks of the judge "hear[ing] the evidence as to the acts complained of." The short answer to this argument is that the government relied on the certified transcript of the proceedings before the referee, which, standing unchallenged, the court properly accepted as a true recital of the material facts. It would have been pointless, under the circumstances, to require a complete re-enactment through witnesses of what both sides agreed had occurred. The same procedure has been tacitly approved in cases involving contempt consummated before a grand jury. See, *e.g.*, *Piemonte* v. *United States*, 367 U.S. 556. There is no reason to assume a more cumbersome procedure is necessary here.

It is true the record does not reflect that the official transcript of the proceedings before the referee was formally offered into evidence. However, the record also fails to show any objection in the district court to this informal procedure. It is apparent that

[1] The fact that the complete transcript of the evidence had been furnished to petitioner prior to the hearing was beneficial to petitioner. It specifically informed him and his attorney in advance of trial what evidence petitioner had to meet.

both sides chose to rest their case on the official transcript as a fair and accurate portrayal of the proceedings.

The trial judge did not determine guilt upon the bare certificate of the referee (R. 2). He determined guilt after "having the benefit of oral argument by the respective attorneys and having examined the records and official transcript of testimony". This case is therefore totally unlike *In re McIntosh*, 73 F. 2d 908 (C.A. 9) where the district court considered itself bound by the certificate of contempt filed by the referee and would hear evidence only in mitigation of guilt. Since petitioner offered no evidence refuting or explaining the transcript, the trial judge properly made his determination on the basis of the written record of proceedings.

2. Petitioner's contentions as to the conduct of the proceeding under Section 21(a) are irrelevant to the issue of contempt. Petitioner was obligated to remain orderly and not create a disturbance. There could be no justification to disrupt the good order of the hearing by pounding on the bench. *Fisher* v. *Pace*, 336 U.S. 155, 163; *United States* v. *Sacher*, 182 F. 2d 416, 430, affirmed 343 U.S. 1. Even if the referee made an error of law, that does not excuse petitioner's conduct. Cf. *United States* v. *Mine Workers*, 330 U.S. 258, 289–295.

a. The referee ruled that petitioner's attorney could be present at the hearing and that petitioner was entitled to a recess to consult his counsel if he desired, but that the attorney would not be permitted to object to the questions asked by the attorney for the trus-

tee. In a Section 21(a) examination, an ordinary witness has no right to have his attorney participate. If the witness is also a creditor, the law is cloudy as to the extent of participation permitted to the creditor's attorney. See *In re Emigh*, 243 Fed. 988 (N.D.N.Y.); 2 Collier on *Bankruptcy* (14th ed. 1961), § 21, p. 317. If petitioner's attorney thought the referee's ruling as to his participation too narrow, he could have sought a ruling from the district court. The issue has no bearing on petitioner's conduct in pounding with his fist.

b. Similarly, there is no relevancy in the contention that the examination was not confined to the "acts, conduct or property of a bankrupt" and therefore went beyond the limits authorized by the statute. Moreover, the record does not support the contention. Petitioner does not point to any particular line of questioning which he considers objectionable. Most of the questions put to petitioner pertained to the amount of inventory the bankrupt had possessed in his tavern on June 27, 1960, and whether petitioner had accepted the bankrupt's written inventory of assets on that date, in the amount of $927, as being substantially correct (R. 12–27). Other questions related to the amount of rent that the bankrupt had agreed to pay for the rental of the tavern. It thus can be seen that the examination was confined to the property of the bankrupt. In so far as the examination also touched petitioner's claim as a creditor, this was inevitable because the assets and liabilities of the bankrupt are the liabilities and assets of his debtors and creditors.

c. Petitioner raises, but does not argue, the contention that his conduct before the referee was excusable because he was not paid his witness fees and mileage prior to his examination. If petitioner had failed to appear at the hearing, a failure to tender witness fees might have constituted a defense to such a default. See *Saper* v. *Hague*, 186 F. 2d 592 (C.A. 2). But by testifying without objecting to the nonpayment of witness fees, petitioner waived any irregularity in this respect. Once he undertook to testify, he was obliged to do so in a proper manner. The absence of fees does not excuse his misbehavior during the examination.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 171

JAMES J. DONOHUE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The Argument contained in the Brief for the United States which has been filed in opposition to the Petitioner's Application for Writ of Certiorari compels a reply thereto as authorized by Rule 24 (4) of the Revised Rules of the Supreme Court of the United States.

On Page 9 of the brief, the Government's counsel argues:

> "Petitioner does not in this Court attack the finding that his conduct constituted contempt, and rightly so. His disorderly conduct in striking 'the bench'

> while shouting his reply to the referee constituted misbehavior which interfered with the orderly administration of justice."

Petitioner most certainly does attack such finding. Argument has been made, as fairly comprised in the record, that there was absolutely no evidence introduced at the contempt hearing which supports the contention that there were any acts committed which could be termed "disorderly". That there was no evidence introduced at the contempt hearing of any bench striking. That there is no evidence in the record of any "shouting". That there is no evidence in the record *from which to infer that there was any interference with the orderly administration of justice.*

On Page 11 therein, counsel for the Government state:

> *"It is true the record does not reflect that the official transcript of the proceedings before the referee was formerly offered into evidence."* (And it wasn't!) "However, the record also fails to show any objection in the District Court to this informal procedure." (emphasis supplied)

Actually such "official transcript" was only a part of the certificate of the referee—nothing more than a pleading. See in re *Matter of McIntosh*, 73 F. (2d) 908. It (transcript) was not stipulated to as to accuracy and the shorthand reporter's comments therein were not admissible into evidence in such manner as a violation of the "best evidence" rule and since it deprived defendant of his right to cross examine! It would seem unique for the Court to hold in any trial, *under any circumstances,* that it is the defendant's burden to proceed and introduce evidence and raise objections *before the prosecution*

has made any offer of proof whatsoever. If the counsel for the prosecution fumbles the ball, and fails to carry the required burden of proof, does our system of jurisprudence require defense counsel to fill in his case for him? Simply stated, is a man innocent until proved guilty or is he guilty until proved innocent?

Counsel cites *Piemonte vs. United States*, 367 U.S. 556, and states:

> "There is no reason to assume a more cumbersome procedure is necessary here."

The *Piemonte case*, of course, involved a situation wherein the Petitioner flatly refused to answer questions before a Grand Jury and the Trial Judge *asked the Petitioner several times if he persisted in refusing to answer the questions.* (To which Piemonte, the Petitioner, replied in the affirmative.) In our case, the Petitioner was convicted without being confronted by any witnesses and without any evidence being introduced into the record against him. He was not even asked what his plea was! In *Cook vs. United States*, 267 U.S. 517, 529, the Court stated:

> "Petitioner was convicted without being confronted by any witnesses or evidence against him, and there is no evidence of guilt in the record to sustain the conviction."

In considering the *Piemonte case* attention is called to the words of Chief Justice Warren in his dissenting opinion at page 564:

> "Even if the Court is unwilling to recognize that the Constitution prohibits the imposition of punishment in a summary proceeding, it ought to exercise its supervisory power over the lower Federal Courts

to rectify the abuse of the summary contempt power which the record in this case makes manifest.

See *Offutt vs. United States*,
348 U.S. 11."

In the *Offutt case* the Court intimates that a "rare flareup", a "show of evanescent irritation — a modicum of quick temper * * * *must be allowed even Judges.*" (emphasis supplied)

At page 13 of the Brief in Opposition, counsel admits and states that in a Section 21(a) examination:

"If the witness is also a creditor, *the law is cloudy as to the extent of participation permitted to the creditor's attorney* * * * if Petitioner's attorney thought the referee's ruling as to his participation too narrow, he could have sought a ruling from the District Court." (emphasis supplied)

It is respectfully submitted that *there is absolutely no reason why the law should be permitted to remain cloudy* on this or any other point! Further, under such circumstance, how would one seek a ruling from the District Court and what opportunity was there to do so? It is respectfully submitted that it is entirely proper to seek such ruling from this Honorable Court whose historical function it has been to obliterate such offending clouds and create a clear range of vision for our successors.

Further, on page 13 of their Brief in Opposition, it is stated:

"Petitioner does not point to any particular line of questioning which he considers objectionable."

Then again on page 13:

"In so far as the examination also touched Petitioner's claim as a creditor, this was inevitable because

> the assets and liabilities of the Bankrupt are the liabilities and assets of his debtors and creditors."

Attention is called to pages 8, 9, 10, 11 and 12 of the Petitioner's Brief on Appeal which is in the record as certified by the Clerk of the Court of Appeals for the Seventh Circuit. Surely Petitioner has pointed to particular lines of questioning which he considers objectionable *and rightly so!* Further, it is respectfully asserted that if the examination must "inevitably" touch on the witness's claim as a creditor, then the law should, as a matter of right, permit *such creditor-witness* to have his attorney who is present with him participate fully to make seasonable objection to errors and irregularities. Otherwise, under Section 32(c)(2) of the Bankruptcy Act as referred to in the original Petition, such errors and irregularities are *waived!*

On page 14 of the Government's Brief we find fair warning of the injustice which then has opportunity to result as it did here. Without citing any authority, counsel states:

> "But by testifying *without objecting* to the nonpayment of witness fees, *Petitioner waived any irregularity* in this respect." (emphasis supplied)[1].

Finally, in the Brief submitted in opposition to the request of the Petitioner, it is pointed out that questions are raised which are not *fully* argued in the Petition.

---

[1] Attention is invited to the significance to be attached to the wording in Section 41(a) of the Bankruptcy Act, 11 U.S.C. 69.:

> "A person shall not, in proceedings before a referee, * * *, having taken the oath, refuse to be examined according to law: *Provided*, That a person * * * shall not be required to attend *as a witness* * * * unless his lawful mileage and fee for one day's attendance *shall* be first paid or tendered to him." Note word "*Provided*" which is *emphasized* in the rule. (Other emphasis supplied).

This is not very helpful to a determination of whether or not the Writ should issue. The questions to be answered remain before us. The Petition for a Writ of Certiorari *should be* granted in this instance. Then ample argument can and will be presented on the merits of the Petitioner's cause if the Court permits. Justice must not miscarry and the high standards of our established legal philosophy must be met.

Wherefore, your Petitioner humbly and in all sincerity prays that this Honorable Court will grant to him the relief he seeks.

Respectfully submitted,

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Dated: July 25, 1962.